



Building and Development Dispute Resolution Committees—Decision

Sustainable Planning Act 2009

Appeal Number:	11 - 15
Applicant:	Susan Rae
Assessment Manager:	GMA Certification Group
Concurrence Agency: (if applicable)	Douglas Shire Council (Council)
Site Address:	The Lakes Estate, Old Port Road, Port Douglas

Appeal

The appeal is made pursuant to section 527 of the *Sustainable Planning Act 2009* (SPA) against the Decision Notice issued by GMA Certification Group as Assessment Manager to approve with conditions a Building Development Application for a house and garage dwelling in accordance with Concurrence Agency advice received from the Douglas Shire Council.

Date and time of hearing:	24 March 2015 at 10:00am
Place of hearing:	The subject site and Douglas Shire Council's offices
Committee:	Mr John Eylander – Chair Mr Clayton Baker - Member
Present:	Ms Susan Rae – Applicant Mr Jeff Evans – Assessment Manager, GMA Certification Group Ms Jenny Elphinstone and Mr Michael Kriedemann, representatives of Douglas Shire Council

Decision:

In accordance with section 564(2)(c) of the SPA, the Building and Development Dispute Resolution Committee (Committee) **sets aside** the decision of the Assessment Manager and approves the siting of the dwelling up to 200mm from the rear boundary as detailed on drawings identified as plan number 412-09 sheet 1 and 2 of 16, issue date 26/08/14.)

Background

The subject site is an elongated irregular shape and approximately 1000m² in area. The block is part of a gated estate and is positioned on a cul de sac of eight properties with lake frontage. The subject site adjoins the lake on the lake's earthen and rock embankment. This lake retains stormwater as part of the Council's stormwater system. The lake has visual amenity and appeared healthy with flowering water lilies, aquatic vegetation, active fish stock, birds, and a resident saltwater crocodile.

The proposed dwelling is a 380 square metre low set elongated home. The two predominate sections of the home have side court yards. The views from the home are predominantly to the street frontage and the rear boundary.

The rear of the proposed dwelling is irregular in shape with the outer most projection of the roofline coming to a point at the rear boundary line. The dwelling foot print has an approximate width to its rear section of 8 metres under roof. The rear of the proposed dwelling has an open patio with access to a pool sited along the boundary line to the side of the patio area. The patio's opening is 2.1 metres in height with a rear ceiling line of 3 metres. The roof height will be approximately 4.5 metres measured to the top of the ridge. The structure will be roofed with steel sheeting.

The irregular front of the property is greater than 15 metres wide. The elevated building pad has been constructed with a 1.2 metre block retaining wall at the rear, filled and compacted. The rear block wall sits on a strip footing on the boundary line at the top of the lake's embankment

The dwelling is within the 1.5 metre clearance of the Queensland Development Code (QDC) MP 1.2 (QDC) and must be referred to the Council as a Concurrence Agency.

On 16 February 2015 the Council, as Concurrence Agency, approved the Application with conditions as stated below:

1. a. The specifications, facts and circumstances are set out in the application submitted to Council; and
b. Condition 2 below.
2. All development must be setback a minimum of 1000mm from the western (rear) boundary.

The reasons provided by Council for imposing the above conditions are: "*to ensure the development satisfies the performance criteria stated in Performance Criteria 1 and 2 (P1 and P2), of the Queensland Development Code MP 1.2 (QDC MP 1.2)*".

On the 19 February 2015, the Assessment Manager issued a Decision Notice approving the Application with conditions, as per the Council's Concurrence Agency response.

On the 26 February 2015, the Applicant lodged an 'Application for appeal/declaration- Form 10' with the Committee's Registrar against the decision of the Assessment Manager.

On 23 March 2015, an appeal hearing was held on the subject site followed by an off-site hearing at Council chambers.

It was agreed by all parties at the hearing that the only element of the performance criteria in P2 relevant to the appeal is P2(c). Performance criteria "P2 building and structures" requires the following:

- (a) Provide adequate day light and ventilation to habitable room; and
- (b) Allow adequate light and ventilation to habitable rooms of buildings on adjoining lots; and
- (c) Do not adversely impact on the amenity and privacy of residence of adjoining lots.

Acceptable solution A2(a)(i) of QDC MP 1.2 requires a building or structure less than 4.5 metres in height to be located at least 1.5 metre from a side boundary. There are concessions in A2(c)(ii) and A2(d) of QDC MP 1.2, which allows certain structures to be placed on the boundary but those concessions do not apply to this dwelling.

To satisfy acceptable solution A2 of QDC MP 1.2, the building work must be set back at least 1.5 metre from the side and rear boundaries or alternatively, be shown to comply with the relevant performance criteria of QDC MP 1.2 before the Assessment Manager can approve the Application. The Council can only undertake assessment against Performance Criteria P2 of QDC MP 1.2 with respect to the rear boundary encroachment.

The Council delegated authority report on the site dispensation for the construction of a house and garage at the subject site relevant provided:-

"Concern is raised with the set back from the rear boundary to the west. The boundary is to a public park that contains a lake and retaining wall. Concern is raised with the minimal (200mm) siting and the ability of ongoing maintenance to be undertaken from the land. The minimal set

back is not considered sufficient to provide amenities to the users of the adjoining park lot. A condition of the approval requires a minimum set back 1000mm to enable maintenance to be achieved from the land and provide a separating distance to the park."

Other issues raised during the appeal

There were several issues discussed by Council at the hearing for which the Committee does not have jurisdiction to consider as part of this appeal.

The Council's reasons for approving the Application with conditions are:

- The central issue raised by the Council in its oral and written submissions and letter dated 16 March 2015 is the proposed building work is sited on the zone of influence to the lake's embankment.
- The Council submits the engineering design and the soil test report does not consider the impact of the development on this zone of influence to the lake wall and raised concerns about the foundation of the retaining wall incorporated into the house slab against the rear boundary.
- The Council believes an Application ought to have been made by the Assessment Manager to the Concurrence Agency with respect to QDC MP 1.4-Building over or near relevant infrastructure. That is, the Assessment Manager failed to refer the Application to the Council with respect to the "storm water infrastructure".

The Committee believes there is substance to the above submissions and makes comment below.

The referral trigger pursuant to the Sustainable Planning Regulation 2009 (SPR) schedule 7, table 1- the building work assessable under the BA relevantly refers to a storm water drain. The lake forms part of the storm water retention system.

QDC MP 1.4 relevantly provides at section 7 – definitions: -

Relevant infrastructure means any of the following infrastructure, including the *connection* for the infrastructure -

- (a) a *sewer* operated by or for a *sewage service provider*; or
- (b) a *water main* operated by or for a *water service provider*; or
- (c) a *stormwater drain* operated by or for a local government; or
- (d) a *combined sanitary drain*.

Storm water drain means –

- (a) infrastructure used for receiving, storing, transporting or treating storm water; and
- (b) any maintenance covers for the infrastructure.

QDC MP 1.4 provides for Acceptable Solutions for building over or near relevant infrastructure. These acceptable solutions do not provide for the relevant infrastructure for storm water retention infrastructure being the lake.

Chapter 1 section 2 of QDC MP 1.4 states the purpose as:-

The purpose of this QDC part is to ensure *building work* for a *building* or *structure* on a *lot* that contains, or is adjacent to a *lot* that contains, *relevant infrastructure* is carried out so—

(a) the work does not—

- (i) adversely affect the operation of the infrastructure; or
- (ii) place a load on the infrastructure that could adversely affect its structure; and

(b) the integrity of the *building* or *structure* is unlikely to be affected as a result of the infrastructure—

- (i) being maintained or replaced; or
- (ii) failing to function properly; and

(c) when completed, the work allows—

- (i) any gas that builds up in the infrastructure to escape in a way that ensures individuals in close proximity to a *maintenance cover* for the infrastructure are not harmed by the gas; and
- (ii) the *relevant service provider* the access above the infrastructure required for inspecting, maintaining or replacing the infrastructure.

The Assessment Manager submitted as there was no "relevant infrastructure" restricted to a sewer, water main, storm water drain pipe.

The Decision Notice issued by the Assessment Manager provides standard conditions 10 of Attachment A - Building Conditions:

Retaining walls – (if applicable) retaining walls over 1m high, or within 1.5m of any building works or another retaining wall and/or subject to surcharge loadings will require building approval along with Engineer's design and certification.

The retaining wall to the boundary of the rear property to the lake has been constructed in accordance with the plans. It is not clear if the Engineer was cognisant of the lake embankment when designing this wall and footings. The Council raises concerns with the work now performed and seek certification that the wall meets applicable standards or Engineering principles. Council will need to consider the mechanisms within the SPA if it wishes to pursue this issue, whether by enforcement action or otherwise.

Material Considered

The materials considered in arriving at this decision comprises:

1. "Form 10 – appeal notice", lodged 26 February 2015 with the Committees Registrar.
2. Development Application Decision Notice from GMA Certification Group dated 19 February 2015.
3. IDASs Forms 1 and 2 application for the subject site.
4. GMA Certification Group Pty Ltd application for alternative citing assessment dated 6 February 2015.
5. Douglas Shire Council Concurrence Agency response – approval with conditions dated 16 February 2015.
6. Emails between the parties on 18 and 19 February 2015 discussing the decision and reasons for the decision.
7. Douglas Shire Council delegated authority report, siting dispensation for the construction of a house and garage dated 16 February 2015.
8. Applicant's grounds for appeal of roof boundary clearance butting the lake reserve dated 24 February 2015.
9. Queensland Development Code MP1.2 – Design and Siting Standard for Single Detached Housing -on lots greater 450m² (QDC MP 1.2)
10. *Sustainable Planning Act 2009* (SPA).
11. *Building Act 1975* (BA).
12. Douglas Shire Council letter dated 16 March 2015.
13. Douglas Shire Council written submissions received 23 March 2015.
14. Verbal representations by appeal parties at the hearing.

Findings of Fact

The Committee makes the following findings of fact:

1. The Applicant's grounds for appeal are:-

- The roof is only at a 200mm proximity to the boundary only at one single point at a right angle. It is due to the irregular and extreme angle of the property boundary line.
- The roof is not over an enclosed area or room and is 4 metres above existing ground level.
- The roof is over an outdoor area similar to a pergola and there are other roofs in the estate over same outdoor use areas within same proximity to rear boundary as lot eleven's design.
- The lake rock wall abutting the property has no trees or vegetation to be managed and is kept free of weeds by residents in The Lake estate not by Council.
- The roof does not encroach onto or over the boundary and does not impede any activity that may occur on the lake or its boundaries or surrounds.
- The roof as designed will not obstruct or impede on any other property in the estate.
- Other homes in Port Douglas have roofs that do encroach directly onto boundaries of park land – such as beach front mirage for example.
- The Lake body corporate and architectural panel have approved the plan as submitted.
- There is no valid reason to alter the roof as designed.

2 The central issue in this appeal is the Building Development Application that was referred to the Council as Concurrence Agency for alternative siting pursuant to QDC MP 1.2.

There are no alternative siting standards, pursuant to section 33 of the BA, applicable to the site for the following reasons:

- The land area exceeds 450 square metres therefore QDC MP 1.2 applies to the site.
- It is proposed that the building work for the dwelling, measured to the top of the roof from the adjacent finished surface level, will be approximately 4.5m in height. It is also proposed that the dwelling roof corner be no closer than 200mm from the rear boundary. Thus, the Application for building work is subject to Concurrence Agency advice because the structure is within the 1.5m boundary clearance prescribed under QDC MP 1.2.
- The only Performance Criteria of QDC MP 1.2 relevant to the appeal is P2(c). Performance criteria "P2 building and structures" requires the following:
 - (a) Provide adequate day light and ventilation to habitable room; and
 - (b) Allow adequate light and ventilation to habitable rooms of buildings on adjoining lots; and
 - (c) Do not adversely impact on the amenity and privacy of residence of adjoining lots.

3 There are no residents on the adjoining lot to the rear affected by the proposed dwelling therefore maintenance can easily be carried out from within the property boundary.

4 The structure complies with performance criteria P2(c) of QDC MP 1.2 in its proposed location in so far as adequate daylight and ventilation will be provided to the rooms at the rear of the dwelling and the rear setback will allow adequate daylight and ventilation for the neighbouring buildings.

5 There will be no adverse effect on amenity and privacy because the property to the rear is a lake and as such there are no residents on the adjoining lot to the rear to be affected by the proposed dwelling. In addition, the dimensions of the proposed dwelling are such that the building will not present an imposing presence on the lake frontage, and will be in keeping with the amenity of the neighbourhood. Maintenance can easily be carried out from within the property boundary.

Reasons for the Decision

For the reasons outlined above, the Committee in accordance with section 564(2)(c) of the SPA, sets aside the decision of the Assessment Manager and approves the siting of the dwelling up to 200mm from the rear boundary as detailed on drawings identified as plan number 412 -09 sheet 1 and 2 of 16, issue date 26/08/14.)

John Eylander
Building and Development Committee Chair

Date: 20 April 2015

Appeal Rights

Section 479 of the *Sustainable Planning Act 2009* provides that a party to a proceeding decided by a Committee may appeal to the Planning and Environment Court against the Committee's decision, but only on the ground:

- (a) of error or mistake in law on the part of the Committee or
- (b) that the Committee had no jurisdiction to make the decision or exceeded its jurisdiction in making the decision.

The appeal must be started within 20 business days after the day notice of the Committee's decision is given to the party.

Enquiries

All correspondence should be addressed to:

The Registrar of Building and Development Dispute Resolution Committees
Building Codes Queensland
Department of Housing and Public Works
GPO Box 2457
Brisbane QLD 4001
Telephone (07) 1800 804 833 Facsimile (07) 3237 1248